

## Illinois Appellate Court Vacates Two Judgments Entered Against Honeywell for Failing to Produce Consultant at Trial

### *Toxic Tort and Environmental Law Update*

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Officer, director, employee or independent contractor? The nature of a company's relationship with its consultant determines its obligation to produce that person at trial, an Illinois appellate court ruled in early February 2012.

In *Hoogerwerf, etc. v. Honeywell Int'l, Inc.*, No. 4-11-0329 (cons), 2012 IL App. (4th) 110329 (Ill. Ct. App. Feb. 2, 2012), the Illinois Appellate Court considered two judgments entered against Honeywell in a pair of asbestos-related civil conspiracy actions. In each action, the trial court entered a default judgment against Honeywell on the issues of liability and causation when it found that Honeywell failed to produce its consultant as a witness at trial. The court's ruling was based on Illinois Supreme Court Rule 237(b), which allows any party to require the appearance of the opposing party's officer, director or employee at trial.

Honeywell's primary argument was that the consultant was not an officer, director or employee of Honeywell at the time of trial. The consultant had worked as an industrial hygienist and corporate head of product safety for a predecessor company that later merged with Honeywell after his departure in 1997. The consultant then ran his own firm and primarily assisted Honeywell in asbestos litigation, providing representative corporate information regarding products and events that occurred long ago. Honeywell designated the consultant as an "independent contractor," although the majority of his total consulting revenues derived from his work with Honeywell, he regularly reviewed and verified Honeywell's written discovery responses, and he regularly testified at depositions and trials on behalf of Honeywell.

On appeal, the Appellate Court reversed the trial court's ruling, finding Honeywell's designation of the consultant as an independent contractor critical to its analysis. As the plaintiffs had not shown

that the consultant was an "officer, director, or employee" as necessary to require his appearance at trial pursuant to the Supreme Court Rule—and the trial courts had similarly avoided making this finding as well—the Appellate Court could not sustain the default judgments entered against Honeywell and vacated each.

Illinois Supreme Court Rule 237(b) is not unique. Companies in litigation across the nation are held to identical rules and routinely burdened by requirements to produce their corporate representatives at trial. Toxic tort and environmental cases present unique challenges to identify representatives because many salient events—product manufacturing, release, exposure—preceded current employees' tenure. The ruling by the Illinois Appellate Court may be used persuasively in other states and, if it takes hold, will allow companies to employ consultants in litigation without necessarily being required to produce them at trial.

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